on the eve of insolvency may not give away its assets.[8] And, like a natural person, in the absence of statutory provisions, it may give a preference to some of its creditors;[9] although the opposite result has been reached under the trust-fund theory.[10] So also a sale with intent to defraud or hinder creditors is voidable, as where the transferee is a new corporation whose stockholders are the same as those of the selling corporation.[11] But a sale in the ordinary course of business to a purchaser for value without notice cannot be set aside,[12] even though it be a sale of all the corporate assets.[13] It was, however, held in a recent case that if the corporate assets were sold in return for stock of the purchasing corporation issued to the sole shareholder of the selling corporation individually, and by him pledged to individual creditors, the creditors may charge the assets so sold with an equitable lien in the hands of the purchasing corporation. *Luedecke* v. *Des Moines Cabinet Co.*, 118 N. W. 456 (Ia.). The court repudiates the trust-fund doctrine, which has been given as the basis for similar decisions,[14] and properly rests the result on the ground that the transfer was a fraudulent conveyance, and the purchasing corporation not a *bona fide* purchaser. It is unnecessary to find any actual intent to defraud or delay the creditors, since the issue of the stock to the individual shareholder necessarily tends to deprive the corporation of its ability to pay its debts. The transaction is in effect a distribution of the corporate assets while debts are still unpaid, and the purchasing corporation is coöperating in the fraud. And although the creditor could follow the proceeds of the sale in the hands of the stockholder, that right is lost by a sale or pledge to a purchaser for value and without notice, and is clearly an inadequate remedy.[15] A result similar to that of the principal case has been reached where the buying corporation gives no consideration except a promise to assume the debts of the selling corporation.[16]

REGULATION OF INTERSTATE COMMERCE BY THE COURTS PENDING INVESTIGATION BY THE INTERSTATE COMMERCE COMMISSION. — Prior to legislation by Congress interstate commerce was regulated under the common law, enforced in the state or federal courts.[1] At first the extension of common law principles to a subject in federal control was disputed,[2] but a decision of the Supreme Court settled this question.[3] The common law required public carriers to charge a reasonable rate; and a recovery in damages for excessive charges was allowed the shipper.[4] Consequently, when damages were inadequate, an injunction would be issued to prevent the establishment

[8] Morgan County *v.* Allen, 103 U. S. 498.
[9] Farwell Co. *v.* Sweetzer, 51 Pac. 1012 (Col.). See 11 HARV. L. REV. 550.
[10] Olney *v.* Land Co., 16 R. I. 597.
[11] Central Ry. *v.* Paul, 93 Fed. 878.
[12] See Nat. Bank *v.* Texas Co., 74 Tex. 421.
[13] Warfield *v.* Marshall Canning Co., 72 Ia. 666.
[14] Hurd *v.* Laundry Co., 167 N. Y. 89.
[15] See Hibernia Co. *v.* St. Louis Co., 13 Fed. 516.
[16] Cole *v.* Iron Co., 133 N. Y. 164.

[1] Concerning the concurrent jurisdiction of state and federal courts, see Judson, Interstate Commerce, § 44.
[2] Murray *v.* Chicago & N. W. Ry. Co., 62 Fed. 24. *Contra*, Swift *v.* Philadelphia & Reading Ry. Co., 64 Fed. 59.
[3] Western Union Telegraph Co *v.* Call Publishing Co., 181 U. S. 92.
[4] Murray *v.* Chicago & N. W. Ry. Co., *supra.*

or continuation of such charges.[5] Moreover, because of the power invested in the federal government to regulate commerce, an injunction was granted at suit of the United States to restrain an interference with an interstate railroad,[6] and in the opinion of two judges of the Supreme Court such a suit could have been instituted to prevent the exaction of an unreasonable rate.[7] Thus the courts could in some measure have regulated interstate commerce even without congressional action.

When Congress first legislated on this subject, provision was made for an Interstate Commerce Commission to assist in the enforcement of the act, with quasi-judicial powers of investigation,[8] and power to enforce through the federal courts the results of its investigations.[9] But the carriers retained their power to fix rates in the first instance, subject only to the provisions of the act.[10] Those provisions were in many respects merely declaratory of the common law,[11] and express provision was made that the existing common law remedies should remain.[12] Yet when suit was instituted prior to action by the Commission for the recovery of excessive charges or to enjoin an established rate as unreasonable, the circuit courts refused to act, on the ground that these common law rights had been impliedly repealed, because otherwise the purpose of the act would be destroyed.[13] This argument is conclusive; for if, notwithstanding the provisions of the act for an investigation of any dispute by the Commission and for equal and uniform rates to all shippers, the courts could alter rates which they thought unreasonable, either the express provisions of the act forbidding discriminations would be nullified if the alteration were applied only to the parties in litigation; or if an injunction were issued for the benefit of all shippers, there would be no investigation by the experts of the Commission, since the decree of the court would be final. Moreover, as the determination of the reasonableness of a rate is a question of fact, divergent conclusions might be reached in different courts, with resulting discrimination and lack of uniformity. Similar considerations caused the circuit courts to refuse to grant a temporary injunction restraining the enforcement of an established rate until final action by the Commission.[14]

The Commission itself has no authority to issue such an order or secure its enforcement.[15] So, to prevent an increase which might be unreasonable and might cause an irreparable injury to the shipper — and, it must be said, if so prevented, possibly to the carrier — some recent decisions draw a

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[5] Menacho *v.* Ward, 27 Fed. 529; Southern Express Co. *v.* Memphis, 8 Fed. 799.

[6] *In re* Debs, 158 U. S. 564.

[7] Missouri Pacific Ry. *v.* United States, 189 U. S. 274.

[8] 25 Stat. at L. 858, § 3. The power of the commission is extended by later legislation. 34 Stat. at L. 584, § 4.

[9] Texas & Pacific Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

[10] Interstate Commerce Commission *v.* Cincinnati, New Orleans & Texas Pacific R. R. Co., 167 U. S. 479. The Commission can now establish a maximum rate. 34 Stat. at L. 584, § 4.

[11] 24 Stat. at L. 379, §§ 1, 2. See Southern Ry. *v.* Tift, 206 U. S. 428.

[12] 24 Stat. at L. 387, § 22.

[13] Texas & Pacific Ry. Co. *v.* Abiline Cotton Oil Co., 204 U. S. 427; Potlach Lumber Co. *v.* Spokane Falls Ry. Co., 157 Fed. 588.

[14] Great Northern Co. *v.* Kalispell Lumber Co, 165 Fed. 25. But the common law remedy to compel by injunction equal or impartial service is preserved. Such action, affecting only the parties in litigation, is not inconsistent with the creation of the Commission or the provisions of the act. *In re* Lennon, 166 U. S. 548, affirming 54 Fed. 746.

[15] Interstate Commerce Commission *v.* Cincinnati, New Orleans & Texas Pacific Ry. Co., *supra.*

distinction between altering an existing tariff and enjoining the establishment of a proposed new tariff, allowing an injunction in the latter case until the final determination of the reasonableness of the rates by the Commission.[16] It is true such action does not involve any alteration of an existing tariff, but the result is in effect the same, and involves a judicial determination of the reasonableness of a rate without any investigation by the Commission, whereas the evident purpose of the legislation by Congress was to give complete jurisdiction to the Commission. Following this line of reasoning, the latest case on this question rejected the distinction made in all previous decisions and refused to temporarily enjoin the enforcement of a proposed new schedule pending investigation by the Commission. *Atlantic Coast Line Ry. Co.* v. *Macon Grocery Co.*, 166 Fed. 206 (C. C. A., Fifth Circ., Jan. 5, 1909). The Supreme Court has expressly left open the question of enjoining rates, established or otherwise,[17] but it is submitted that, consistently with its present attitude,[18] it should refuse to allow any action by the courts prior to the investigation provided for in the Interstate Commerce Act. The remedy should lie at the instigation of the Commission which conducts the investigation.[19]

THE LIABILITY OF PRINCIPALS FOR FRAUDULENT OVER-ISSUES BY THEIR AGENTS. — The liability of principals for tortious issues of bills of lading and certificates of stock by their agents has been rested on various grounds. Jurisdictions not only differ on the main principles, but differ as well in applying them to the various forms of these "quasi-negotiable" instruments. Under the broad principle of *respondeat superior* principals are held liable for torts committed by their agents within the scope of their employment.[1] In defining this scope, however, the courts separate. The English courts hold that it is not within the scope of an authority to issue such instruments fraudulently, nor to over-issue them, thus confining the principal's liability to cases where he might receive some benefit [2] Lord Robertson, however, in a recent case, stated that he found it "extremely difficult on principle to hold that the scope of the agent's employment can be limited to the right performance of his duties, or to say that an agent within whose province it is truly to record a fact is outside the scope of his duties when he falsely records it." [3] The difficulty suggested seems insuperable. If it is possible to say that the principal did not authorize fraud, it would seem equally possible to say that he did not authorize other torts, including negligence.

Another ground for imposing liability is found in estoppel. The principal, having held out his agent as having authority, cannot later deny the authority. But the orthodox doctrine is that the extent of the authority is

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[16] M. C. Kiser Co. *v.* Central of Georgia Ry. Co., 158 Fed. 193; Northern Pac. Ry. Co. *v.* Pacific Coast Lumber Mfrs. Association, 165 Fed. 1.

[17] See Southern Ry. *v.* Tift, *supra.*

[18] Texas & Pacific Ry. Co. *v.* Abiline Cotton Oil Co., *supra.*

[19] The Commission has petitioned Congress for such power. 21st Annual Report of the Interstate Commerce Commission, p. 10.

[1] Ry. Co. *v.* Bank, 56 Oh. St. 351; Schuyler *v.* R. R., 34 N. Y. 30, 49.

[2] Whitechurch *v.* Cavanaugh, [1902] A. C. 117; Ruben *v.* Fingal Co., [1906] A. C. 439.

[3] Whitechurch *v.* Cavanaugh, *supra.*